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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. 5126 [redacted] MISC.

UNITED STATES OF AMERICA EX REL.
CHARLES LEE ALLISON, *Petitioner,*

v.

NEW JERSEY, *Respondent.*

BRIEF AMICUS CURIAE OF EDGAR H. SMITH, JR. IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

EDWARD BENNETT WILLIAMS
STEVEN M. UMIN
1000 Hill Building
Washington, D. C. 20006
Counsel for Amicus Curiae

Of Counsel:

STEPHEN LICHTENSTEIN
Coleman, Lichtenstein, Levy
& Segal
505 Broad Street Bank Building
Trenton, New Jersey 08608

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Pursuant to Rule 42(1) of this Court's Rules, Edgar H. Smith, Jr. *amicus curiae*, files this brief, with the consent of the parties, in support of the petition for writ of certiorari in the case of *Allison* v. *New Jersey*.[1] The *amicus*, confined on Death Row in New Jersey for thirteen years, was the petitioner granted interim

[1] Letters from opposing counsel consenting to the filing of this brief are on file with the Clerk.

AMICUS CURIAE

BRIEF

relief in *Smith* v. *Yeager*, 393 U.S. 122 (1968). There, reviewing a judgment from the same Circuit involved in *Allison*, this Court overturned *per curiam* the holding that Smith had waived a habeas corpus hearing.

Although the Court chose a narrow ground for summary reversal, Smith's petition in this Court, and his underlying habeas application, also tendered squarely the issue presented in *Allison*—the full retroactivity of *Massiah* v. *United States*,[2] 377 U.S. 201 (1964). That habeas application still awaits a District Court hearing, now nearly a year and a half after this Court's decision and almost five years from the date of filing.[3] But even when the hearing is finally held, a fully effective opportunity to litigate the *Massiah* issue within the Third Circuit has been stifled by the startling decision of that Circuit to reach the issue in *Allison*, unaided by briefs from either surprised party.[4]

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[2] Mr. Justice White, alone, dissented from *per curiam* treatment. He would have granted certiorari, however, for full argument. Upon such an argument, the *Massiah* issue, now here in *Allison*, would have been aired.

[3] Smith first presented the facts pertinent to the *Massiah* claim to a federal habeas court as early as 1959, five years before *Massiah* itself. No hearing was held. Smith's pending petition was filed in 1965 and it again urged the *Massiah* problem, then by name. The "waiver" holding, overturned by this Court in 1968, had blocked a hearing for the first three years.

Since this Court's decision, and the remand in turn from the Court of Appeals over a year ago, Smith has three times requested and been denied a firm hearing date in the District Court. A hearing has been projected for this Summer, although the District Court has still not provided a firm date.

[4] Since neither party had briefed the retroactivity point as such, and the Court of Appeals did not request supplemental briefs, none of the usual sources, *e.g.*, United States Law Week, featured *Allison* as a pending *Massiah* case. Accordingly, there was no effective opportunity below to file briefs *amicus curiae*.

Accordingly, litigation-weary after 13 years in the shadow of execution and 5 years awaiting a habeas hearing, the *amicus* urges authoritative settlement of the *Massiah* issue now. But well beyond individual justice, there are pressing reasons of public significance that call for a hearing in this Court.

REASONS FOR GRANTING THE WRIT

1. To Clarify the Status of This Court's Per Curiam Decision in McLeod v. Ohio, 381 U.S. 356 (1965)

McLeod raised no issue of full retroactivity. But by reversing in that case, this Court, without opinion, thereby gave the *Massiah* rule at least *Linkletter* retroactivity since *McLeod* had been on direct appeal when *Massiah* was decided. The existence of *McLeod* therefore distinguishes *Massiah* from *Escobedo* and *Miranda* which were denied *Linkletter* retroactivity in *Johnson* v. *New Jersey*, 384 U.S. 719 (1966).

Nonetheless, as the *Allison* court candidly confessed, some state courts and federal Circuits have ignored *McLeod* altogether and relied upon *Johnson*, *Escobedo*, or *Miranda* to deny the *Massiah* rule retroactive effect. *Commonwealth* v. *Coyle*, 427 Pa. 72, 233 A.2d 542 (1967), vacated on other grounds *sub nom. Lopenson* v. *Pennsylvania*, 392 U.S. 647 (1968); *Elliott* v. *Warden*, 243 Md. 627, 222 A.2d 55 (1966); *Lyles* v. *Beto*, 363 F.2d 503 (5th Cir. 1966); *United States ex rel. Romano* v. *Fay*, 360 F.2d 389 (2d Cir. 1966); See *United States ex rel. Molinas* v. *Mancusi*, 370 F.2d 601 (2nd Cir. 1967).

Other courts, however, have given full effect to *McLeod* and held that it requires at least *Linkletter* treatment of the *Massiah* rule. *Hancock* v. *White*, 378 F.2d 479 (1st Cir. 1967); *United States ex rel. O'Connor*

v. *New Jersey*, 405 F.2d 632 (3rd Cir. 1969); *State v. Cowans*, 10 Ohio St. 2d 96; 227 N.E.2d 201 (1967); *Commonwealth v. McCarthy*, 348 Mass. 7, 200 N.E.2d 264 (1964). Indeed, the state of confusion is such that the *Allison* court below reflected doubt as to the import of *McLeod*, 418 F.2d at 341 and n. 21, even though another panel of the same circuit had relied dispositively upon it. *United States ex rel. O'Connor v. New Jersey*, *supra*.

This Court has observed the development of confusion about *McLeod* long enough. It is fitting for it now to dispel all doubt about the effect of one of its own decisions. That would be fully appropriate in this case because if *McLeod* is law, and a *Linkletter* analysis is proper for the *Massiah* rule, *Massiah* was erroneously denied fully retroactive effect by the *Allison* court. For the considerations impelling a limitation upon the retroactivity of *Mapp* in *Linkletter* are not present with respect to *Massiah*. See analysis *infra*, point 2.

2. To Consider the Unique Question Presented by Massiah's Retroactivity: Where There Is Demonstrably No Significant Impact on the Administration of Justice and No Justifiable Reliance Interest, May a Litigant Be Denied the Benefit of a Constitutional Rule?

If sufficient opportunity for briefing had been granted below, it would have been possible to document, rather than speculate upon, 418 F.2d at 345, the effect of full retroactivity for the *Massiah* rule. Consequently, it would have been possible to frame the issue properly: May some litigants be denied the benefit of a rule of constitutional law in the absence of any evidence in the balance that full applicability would entail a substantial detriment to the legal process?

3. The Massiah Rule Protects the Integrity of the Fact-Finding Process

As the *Allison* court acknowledged, "the cases show that generally a new rule should be retroactive if it strongly supports the fact-finding process. . . ."[8] 418 F.2d at 341. But *Allison* errs in holding that "the trial reliability aspect of *Massiah* is not of primary significance." 418 F.2d at 344.

The facts of the *Smith* case, admittedly not before the Court, show otherwise. There, a detective visited Smith in jail after indictment. As the detective himself testified at trial, he asked Smith to sign a typewritten transcript of a Q. and A. statement he had earlier given in the presence of a stenographer. Smith advised the detective that his lawyer had told him not to sign. The detective then asked Smith whether he acknowledged the "accuracy" of the typewritten papers and Smith gave an "accuracy" acknowledgment. Unknown to Smith, but obviously known to the detective, the acknowledgment was as good as a signature for the purpose of admitting the Q. and A. statement at trial in the typewritten form. But at trial, the impact of the deception was compounded for the trial judge permitted the jury to use Smith's comment on "accuracy" not merely to substantiate the faithfulness of the stenographer's transcription, but to increase, in the words of the charge, the "weight and credibility" of the Q. and A. In short, the post-indictment "accuracy" admission was *used* at trial not simply for admissibility purposes, but as a kind of second incriminating statement, reaffirming the truth-content —"accuracy"—of the first.

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[8] All the more so for rules that are not "new", as in *Massiah*. See Point 2, *supra*, at p. 6.

This Court is not asked to take these facts as true in passing upon the *Allison* case.[9] But, even taken hypothetically, they add to the need for a definitive *Massiah* ruling, for they concretize the threat to the fact-finding process that the *Massiah* rule seeks to eliminate. Counsel for *amicus* recognizes that the pendency of a case such as *Smith* may ordinarily suggest to the Court that it wait to review the problem in that context. But the Court is implored not to pursue that course here in order to avoid the further delay and anguish that pointless litigation in the Third Circuit will impose upon the already overly protracted *Smith* proceedings. The extent of lower court treatment of the legal issue presented by *Allison* is plainly ample to educate the Court's decision-making processes. Moreover, the Court may well use this occasion to distinguish plea cases from others affected by *Massiah*, if that is deemed appropriate. But see *United States* v. *Lucia*, 416 F.2d 920 (5th Cir. 1969) (guilty plea does not waive retroactive application).

Alternatively, if *Allison* is not deemed a suitable vehicle for review, the *amicus* asks the Court that its disposition of the case so indicate to the Third Circuit in order that the *Massiah* issue may properly be subjected for the first time to effective adversary litigation in that jurisdiction.

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[9] Notably, however, the facts relevant to Smith's *Massiah* claim were elicited *by the State from its own witness* at trial. (T. Transcript, p. 521a)

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges the granting of the petition for a writ of certiorari, or alternatively, a disposition other than an unexplained denial.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
STEVEN M. UMIN
Williams & Connolly
1000 Hill Building
Washington, D. C. 20006

Of Counsel:

STEPHEN LICHTENSTEIN
Coleman, Lichtenstein, Levy
& Segal
505 Broad Street Bank Building
Trenton, New Jersey 08608